

ONTARIO HUMAN RIGHTS CODE  
R.S.O. 1990, c. H. 19

BOARDS OF INQUIRY

BETWEEN:

Robert Surge

Complainant

and

Ontario Human Rights Commission

Commission

and

Excelsior Glass Limited, Harold E. Brown and Chris Brown

Respondents

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DECISION

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BOARD OF INQUIRY:

R. Hartman

APPEARANCES:

S. Ffolkes-Abrahams

Counsel for the Ontario  
Human Rights Commission  
Complainant

R. Surge

Respondents

Harold E. Brown, for  
Excelsior Glass Limited  
and in his personal capacity.  
Chris Brown

DATES AND PLACE OF  
HEARING:

September 13 and 14, 1993  
Toronto, Ontario



## Proceedings

This Board was appointed by the Minister on April 1, 1993 to inquire into the complaint of Robert Surge, who alleged discrimination on the basis of handicap and harassment in employment by Excelsior Glass Limited, Harold E. Brown, and Chris Brown.

The hearing was commenced by conference calls on April 19 and June 22, 1993. Present at the oral hearing on September 13 and 14, 1993 were: R. Surge, the complainant, on his own behalf; S. Ffolkes-Abrahams, Counsel for the Ontario Human Rights Commission, with C. Kasenbe, student, assisting; H. E. Brown, respondent, in his personal capacity and as owner and representative of Excelsior Glass Limited; C. Brown, respondent and son of H. E. Brown; and K. Fuller, observer/advisor on behalf of the respondent.

The Board heard sworn evidence from the following: R. Surge, complainant; Dr. J. Baker, gastroenterologist; Dr. C. Lagusis, general practitioner; F. May, co-worker; J. Hoyle, co-worker; and H. Brown, respondent. C. Brown was not called as a witness by H. Brown and did not give testimony on his own behalf. Twenty-one exhibits were filed, including medical reports and employment-related documentation. The Board heard oral submissions from Ms. Ffolkes-Abrahams on behalf of the Commission and from Mr. Brown on behalf of the Respondents.

## Nature of the Case

Mr. Surge was hired by Excelsior Glass Limited, in August 1985, as a glazier's helper. Mr. Surge was dismissed from this employment in November, 1989. On August 8, 1990, Mr. Surge filed a complaint with the Commission. He alleged that, as a person diagnosed as having an inflammatory bowel disease, his right to equal treatment in employment without discrimination because of handicap,

(under section 4(1) and 8 [now s.5(1) and 9] of the Code), was infringed by the Respondents. Mr. Surge also alleged that his right to be free from harassment in employment because of handicap (under section 4(2) and 8 [now s. 5(2) and 9] of the Code), was infringed by the Respondents.

The first issue is whether Mr. Surge's condition is a handicap as defined in the Code; the second, if it is a handicap, whether his rights under the Code were infringed, based on that handicap, by the Respondents.

## Reasons

### A. Complaint of discrimination because of handicap

Mr. Surge's complaint alleges as follows:

3. In October, 1987, I asked the President, Mr. Harold Brown, why I was the only employee to receive a 25 cent an hour raise while other employees received \$1.00. He said that the reason was because I was taking too much time off.

4. I explained that the reason for this was because of bowel disease, which had been diagnosed in 1976. I told him that I was subject to blockages of my bowel and this was the reason for having to take days off. ...

6. On July 10, 1989, I received a warning letter from Mr. H. Brown. Mr. Brown advised that this company was too small to have one of its employees absent as much as I was. He reminded me that he had asked me on July 17, to make an effort to be in early on July 20, regarding the Oakville job. He stated that my wife called in instead, and said that I would not be at work. He said that no reason or excuse was given. He went on to say that I was making it impossible to maintain schedules and my rate of persistent absence from work, usually without good reason, was the worst in the company. In closing, he stated that if they could not depend on me, they would be forced out of necessity to replace me. I was advised that this would be my final warning on this matter.

7. On approximately October 3, 1989, I gave Mr. H. Brown a statement from my doctor dated September 29, 1989, concerning my worsening condition. Mr. Brown said that I could not have a bigger raise as I may have to take time off in the future. He also said that he was not making any money on me. ...

9. On November 8, 1989, I advised Mr. Chris Brown that I needed the next day off for a doctor's appointment. He spoke to his father who called me into his office.

10. On November 8, 1989, I was terminated by Mr. Harold Brown. He said that regrettably, they had to let me go. He said that they could no longer afford me. He felt sorry for my health condition but there was nothing he could do.

#### 1. Evidence heard regarding Mr. Surge's medical condition from 1985 to 1989

The Board heard testimony from the worker and two doctors, Dr. Baker and Dr. Lagusis. Both doctors have treated Mr. Surge for an inflammatory bowel condition, diagnosed as Crohn's disease. The evidence addressed both the general nature of the condition itself and the particular experience of the condition by Mr. Surge.

##### a. Evidence of Mr. Surge

Mr. Surge did not appear to have a firm recollection of dates, periods of time, reasons for his absences from work, and the relationship, if any, of these to his symptoms resulting from Crohn's disease. He would be very precise about a date or sequence of events but when a different date or sequence was given elsewhere, he would say he was confused or could not recall. His testimony was frequently at odds with documentary evidence and with his own previous testimony. While some of the inconsistencies were minor, others were more troubling, making it difficult to accept his testimony overall as reliable in terms of absences and physical symptoms due to his Crohn's disease in the period of his employment.



At the hearing, Mr. Surge was asked to describe the bowel-related pain which allegedly led to his frequent absences from work. He said:

A. It was excruciating. I would curl up into one spot and it would last until the fluid would pass through the stricture area. Then I would have relief until the next line of it came down.

Q. How long would it take?

A. It varied. Some blockages would last me 24 hours to almost two days at times, and I would have to stop eating and take in plenty of liquids. And fatigue would set in from lack of eating.

The above description is of an acute episode of bowel pain. As stated, Mr. Surge could not give a clear picture of when, or with what frequency, such pain occurred in the period from 1985 - 1989. His recollection was that he would have intermittent bouts of bowel pain after eating "heavy foods" between 1978, when he underwent surgery for his bowel problems, and 1990, when he again had surgery.

Other symptoms of Crohn's disease, as experienced by Mr. Surge, included more fleeting abdominal discomfort and increased numbers of daily bowel movements. These resulted not in absences from work but more frequent use of washroom facilities during the work day. Mr. Surge's testimony with regard to the latter will be addressed under his claim of harassment in employment. His estimate of the frequency of flare-ups of his Crohn's disease after 1985 was:

...perhaps one to two flare-ups per month, depending on the conditions; my eating habits and the stress that I would be under. It varies. It's a complicated question to answer.

b. Evidence of Dr. Lagusis, family doctor, from 1978-1989

Dr. Lagusis was formerly a general practitioner at Broadview Community Health Clinic, attended by Mr. Surge since 1976. Dr. Lagusis testified regarding her own medical treatment of Mr. Surge and that of other doctors at the clinic, by referring to Mr. Surge's clinical records. She advised that these records showed that he averaged one visit a month for various complaints between 1979 to 1987. The records showed that Mr. Surge had attended the clinic for bowel complaints once or twice in 1983 and once in June, 1984, at which time he reported pain in the right lower abdomen for a week, with cramping. Mr. Surge apparently made no further visits to the clinic regarding bowel problems until late in 1989.

In a letter to the Commission dated July 8, 1993, Dr. Lagusis defined Crohn's disease as a:

chronic relapsing disease of the gastrointestinal tract characterised by discontinuous areas of inflammation of the small and large bowel often with accompanying strictures, fistulas, and abscesses. Symptoms of the disease typically are diarrhea and abdominal pain but weight loss, vomiting, fever, constipation, perianal discomfort and bleeding from the rectum may also be present depending on the affected area. Extraintestinal involvement such as arthritis may also be present. Treatment may involve surgery or various oral medications.

Dr. Lagusis described Mr. Surge's medical condition related to Crohn's disease, from 1978 to 1987 as follows:

In March 1978 he began to have frequent loose bowel movements with abdominal cramping. In November 1978 Crohn's inflammatory bowel disease was diagnosed. ...

Mr. Surge underwent surgery in November 1978 by Dr. D. Jirsh to have an ileorectal fistula removed. Following this surgery he gained weight and his bowel movements were normal. He remained in remission when seen in follow-up at the inflammatory Bowel Disease Clinic at St. Michael's Hospital in June, 1979.

From this time until 1987 there is an occasional note in his chart regarding crampy abdominal pain but no complaints of diarrhea. ...

[emphasis added]

Dr. Lagusis testified that in October, 1987, Mr. Surge complained of low back pain which the clinic tentatively associated with his pre-existing Crohn's disease. This supposition was ruled out in December, 1987, after Mr. Surge was seen by Dr. Shupak, rheumatologist, who concluded the back complaints were unrelated to the Crohn's disease.

In February and March, 1989, Mr. Surge was seen at the clinic for a rib injury from a fall at work. Blood tests taken in follow-up visits revealed a mild iron deficiency. The clinic doctor ordered x-rays of the bowel. In her letter to the Commission on July 8, 1993, Dr. Lagusis wrote:

...On September 27 [1989]...x-rays [of the upper bowel] demonstrated a narrowed area of bowel proximal to the site of his previous surgical anastomosis compatible with a recurrence of his Crohn's disease. For this reason Mr. Surge was re-referred to the Inflammatory Bowel Disease Clinic.

[emphasis added]

This letter appears to suggest that unrelated blood test results, not bowel complaints by Mr. Surge, led to the request for a bowel x-ray in September, 1989 and the subsequent appointment with Dr. Baker, scheduled for November 9, 1989.

Dr. Lagusis recalled giving Mr. Surge medical notes for time off work but did not recall any note specific to a layoff for symptoms of Crohn's disease, acute or otherwise. She said that she might recommend home confinement "if someone was in a lot of pain and couldn't function because of it." She did not recall doing this in Mr. Surge's case.



c. Evidence of Dr. Baker, treating specialist from 1989-1992

Dr. Baker, gastroenterologist, first examined Mr. Surge, on a referral from Dr. Lagusis, on November 9, 1989 and continued to treat him until February 11, 1992. In a letter to the Commission, dated July 20, 1993, he described the condition known as Crohn's disease as follows:

...Crohn's disease is a chronic inflammatory condition of the intestinal tract which is of unknown cause and which has no specific cure. All our present therapies are designed to alleviate symptoms and suffering but do not cure the disease itself which often recurs even after intestinal resection. Most patients with Crohn's disease are reasonably well and live productive lives both personally and professionally, although with some cost of medications and visiting doctors. The occasional patient is truly incapacitated because of symptoms, but in my experience these cases are relatively few.

At the hearing, Dr. Baker was asked to describe the "truly incapacitated" patient referred to in his letter. He testified that it was:

[...a patient who had] an intractable disease, a disease that I couldn't get under control or a disease for which they had developed unrelated symptoms that would not respond to either surgery or medicines such as profuse diarrhea that went on no matter what happened, abdominal pain that went on no matter what happened, or general systemic weakness that went on no matter what happened.

Now many of these patients or some of these patients, are patients who had to have operations; operation after operation. In other words they get a recurrence; the recurrence is not amenable to medical therapy; it gets bad again and they need another resection. So they end up with what's known as the Short Bowel Syndrome. You can only chop away so much bowel until you don't have very much of it left. And after that you can get into some serious troubles.

Dr. Baker said that in November, 1989, Mr. Surge was not in the category described above as "truly incapacitated" but "midway" between "completely well and totally incapacitated".

Understanding that the origin and cause of Crohn's disease origin is unknown and that the condition is lifelong, Dr. Baker was asked to clarify the usual pattern and progression, if any, of the condition. He testified:

The disease is characterized by remissions and exacerbations. So one may be symptomatic for a period of time and then well for a period of time, and then this may repeat itself. So to say that [Mr. Surge] had those symptoms for two weeks [prior to November 9, 1989] does not mean he had them persistently before the two weeks. But it also does not mean that he had never had them before, either.

He was also asked whether psychological stress was a factor in exacerbations of the disease. He said opinions differed, but he personally did not consider it a factor.

Dr. Baker clarified that there were three types of remissions in Crohns' disease - clinical, ascopic and microscopic. He said that the general use of the term "remission" is meant to refer to clinical remission - i.e. where the patient is asymptomatic and feels well. Clinical remission might exist, he said, even where findings on biopsies or tube inspection reveal "terrible" disease, i.e. in the absence of ascopic or microscopic remission.

Dr. Baker elaborated on Mr. Surge's condition in November, 1989, in his letter to the Commission, as follows:

At that time he was 34 years old and had a long history of Crohn's disease starting in 1978. At that time he had a rectoileal fistula and this required resection of the terminal ileum. By the time I saw him in 1989 he already had a recurrence of his Crohn's disease and was symptomatic with 4 - 5 bowel movements each day and rectal bleeding. I was able to determine at that time that he had a recurrence of the Crohn's disease at the [surgery site]. In addition he had developed Crohn's disease of the colon with a stricture in the sigmoid colon.

At the hearing, Dr. Baker confirmed that the source of his understanding of Mr. Surge's condition prior to November, 1989 was Mr. Surge's replies to questions about his medical history. Mr. Surge apparently reported that his Crohn's

disease had been symptomatic "on and off" since surgery in 1978, and was again symptomatic for "at least two weeks" prior to November 9, 1989.

Asked to describe the severity of Mr. Surge's symptoms in November 1989, Dr. Baker stated that Mr. Surge reported pain in the right lower abdomen, lasting 2-3 seconds at a time, and that he had had "some episodes that lasted an hour or hours [which] were exacerbated or made worse by certain foods." Mr. Surge also reported having lost weight. When asked, Dr. Baker thought such pain could theoretically be severe enough "to interfere with his work".

Dr. Baker was asked by Mr. Brown whether a job involving construction sites, ladders and scaffolding was a "bad job" given the difficulty of getting to washroom facilities. Dr. Baker agreed that it would be "if you had active Crohn's disease", meaning symptomatic Crohn's disease. As to Mr. Surge's ability to perform the duties required of him in his employment, Dr. Baker indicated that there was nothing about the disease or the job which made them incompatible. He said that there were no restrictions as to professions or work performed for persons with Crohn's disease. As to Mr. Surge, he stated:

If I had seen him in the office that day (November 9, 1989) and he was having two bowel movements each day and no abdominal pain and you asked me whether he was going to be able to climb ladders and run three blocks to the bathroom, I would say "Why not?" But there may be other days when he is not because the disease does change.

[emphasis added]

## 2. Conclusions regarding Mr. Surge's condition from 1985-1989

As a context for understanding his condition prior to 1989, it is useful to set out Mr. Surge's treatment for Crohn's disease after his dismissal in November, 1989.

Dr. Lagusis advised in her letter to the Commission that Dr. Baker had unsuccessfully attempted a colonoscopy on November 21, 1989 and used a barium x-ray instead to determine the source of Mr. Surge's symptoms. Mr. Surge was apparently not seen again until June, 1990, when after reporting 4 - 5 bowel movements and "some abdominal discomfort", he was "assessed as medically stable". Bowel pain, distention and constipation were reported in September, 1990 and Dr. Baker reported that he then began treatment, as follows:

On October 16, 1990 he underwent a flexible sigmoidoscopy with dilatation of the rectal stricture. I saw him again [on] November 5, 1990 and he seemed to be somewhat better. He was having 5-6 bowel formed movements each day but without rectal bleeding and no further episode of obstructive symptoms.

I next saw Mr Surge in January of 1991 when he developed recurrent symptoms that had previously been relieved by dilatation of the stricture. He passed only liquid and had abdominal bloating and a gurgling as well as rectal bleeding. Therefore, on January 15, 1991 he had a repeat flexible sigmoidoscopy and another dilatation...which we felt was successfully completed.

At or around that time Mr. Surge started to develop extra intestinal manifestations of inflammatory bowel disease. Specifically, he developed arthritis and had to present to the Emergency Room sometime in January of 1991 with a hot, tender, left knee effusion. He was seen by our Rheumatology Division who felt that this was related to his Crohn's disease and was injected with a steroid. He was then followed carefully by Dr. Shupak.

A few months later Mr. Surge, once again, became symptomatic from the disease .... He was seen twice in June of 1991 with right lower quadrant pain and loose stools and an x-ray again demonstrated recurrent neoterminal ileal Crohn's disease .... Because of the recurrent obstructive symptoms that were not adequately suppressed with steroids Mr. Surge was seen by Dr. Ian Soutter, then in our Division of General Surgery. He agreed that surgery was required and on August 2, 1991 Mr. Surge underwent further resection of the neoterminal ileum. I saw him again on August 26 after the surgery. His pain was gone. He was having 3 semi-formed movements each day and was tapering off his steroids. All and all, he was doing rather well.



The last time I saw Mr. Surge was on February 11, 1992. ...I noted that he was doing exceedingly well since his resection six months previously. He had gained 30 lbs., and was not taking any medication. ...

It is evident from the additional symptoms and intensity of treatment after 1990 that his condition had changed considerably from that from 1978 to 1989. Dr. Baker recalled that Mr. Surge "became more symptomatic" in 1991 and this led to further surgery.

### 3. Is Mr. Surge's condition a "handicap" as defined in the Code?

From a review of the medical documentation and testimony, the Board accepts that Mr. Surge has a medical condition known as Crohn's disease, and that this results in times when he is asymptomatic and others where he is symptomatic to varying degrees.

A handicap is defined in section 10 of the Code, which provides in part as follows:

"because of handicap" means for the reason that the person has or has had, or is believed to have or have had,

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by a bodily injury, birth defect or illness and, without limited the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device, ...

[emphasis added]



There have been no Ontario decisions put before the Board regarding the classification of Crohn's disease as a "handicap" as defined in the Code. While Crohn's disease is a medical condition which could be described as an "illness", does having the condition create a "physical disability" in the sense required by the above definition? Clearly, in periods of acute symptoms, the extreme pain would be disabling and frequent bowel movements could limit one's activities occasionally. As Dr. Baker confirmed, persons with the condition are often "well", however, with no restrictions on activities. It is not apparent to me that the Code provisions were intended to cover everyone with a diagnosed medical condition, which may or may not create a temporary disability. A too broad interpretation of the provisions could arguably render them meaningless.

The question of a transitory disability such as the flu was discussed by an Ontario Board of Inquiry in *Ouimette v. Lily Cups. Ltd.* 12 C.H.R.R. at pages D/32 and D/33. The Board rejected the Commission's submission in that case that "any sickness, so long as it can be justified, regardless of how it was caused, is an illness within the literal meaning of the word as it is used" in the definition of handicap. The Board, in dismissing the complaint, relied on another Board of Inquiry decision, *Cameron v. Nel-Gor Castle Nursing Home* (1985) 5 C.H.R.R. D/2170, noting that:

[the *Cameron* decision] implied that a handicap should be construed to mean something which affects, or is perceived to affect, an individual in carrying out life's important functions: "*Having a handicap means not being able to do one or more important things that most people can do.*"

The Board in *Lily Cups*, *supra*, added that the conditions expressly listed in the Code's definition implied "substantial ongoing limits on one's activities". The Board in *Lily Cups* concluded that it would be wrong to stretch the definition of handicap in the Code:

because of the effect of such a construction on the high purpose otherwise achieved by the interpretation provision in protecting those who are actually or perceived to be materially impaired through illness. Where the Code calls for defined groups to be protected, the Commission would include literally everyone suffering from a few days' illness.

The Board awarded costs against the Commission for bringing forward a "trivial and frivolous" complaint and opined that:

It is not the handicap *qua* handicap that results in protection for the individual. Rather, it is the denial of equal opportunity.

In other words, in this case, if Mr. Surge had a handicap, as defined in the Code, it is not that fact but the treatment received as a result of having that condition which is protected under the Code.

From the medical evidence presented in this case, it is apparent that many persons may have the condition known as Crohn's disease without being disabled by it, in the sense that they remain able to function well in every aspect of living and working. In other words, they are able to do the "important things that most people can do". There may be extreme cases of Crohn's disease where functioning becomes impaired because of pain and debilitating symptoms. Then there are the cases in between - i.e. persons with Crohn's disease who are generally well, with intermittent bowel discomfort and pain.

The Commission in this case referred to a decision of the B.C. Council of Human Rights, *Decker v. K & G Pool Products Ltd. and Okanagan Spa Company Ltd*, 12 C.H.H.R. D/87 (March 1990). Legislation in that province prohibits discrimination "because of the...physical disability..." of a person. Ms. Decker had Crohn's disease and was employed sewing covers for hot tubs. While at work in November 1987, she had an acute episode of bowel pain which caused her to faint. She was taken to hospital by ambulance and was absent from work for 10 days. In February, 1988, after an outpatient procedure to determine the area of bowel inflammation, she returned to work and was dismissed on the basis that she should not return to work without a doctor's certificate as to her fitness to work. Because of the prior fainting episode, the employer argued Ms. Decker was a safety risk as she might faint again and fall from the mezzanine area in which she worked. The B.C. Council found that the employer, in dismissing Ms. Decker, had discriminated against her because of her disability and that the employer's safety argument was without merit.

While the facts of the Decker case are not analogous in any way, it is a precedent for finding Crohn's disease to be "a physical disability". On the facts in that case, the employer's fears and overreaction appear similar to those which used to arise when the employment of persons with epilepsy was discussed - dangers in the face of a sudden, immediately debilitating, onset of symptoms, albeit short-lived. There were a few passing references to hypothetical dangers in Mr. Surge's case - such as what might happen if he had to suddenly leave to use a washroom while in the midst of helping a glazier install a heavy window or door frame. However, the main concern was Mr. Surge's absence - for the day or for the duration of a visit to the washroom.

The Ontario Code is specific in its definition - discrimination exists where a person receives unequal treatment on the basis of a physical disability caused by illness which they have or are believed to have or have had. Clearly, Mr. Surge has Crohn's disease, a condition which is ongoing and is not commonplace or widely shared in the same sense as the flu addressed in *Lily Cups*, supra. Less clear, is whether it can be said that this condition limited Mr. Surge's ability to do "one or more important things that most people can do" *during the period of his employment from 1985 to 1989*.

After surgery in 1978, Mr. Surge's condition appears to have been in clinical remission (i.e. he felt well with fairly regular bowel movements and no weight loss), as evidenced by histories taken when seen at Emergency rooms, in 1985 and 1987, (discussed below) and by the medical reports from his own doctors. Symptoms associated with active Crohn's disease resurfaced in the late fall of 1989. Prior to this, while some bowel-related symptoms existed for brief periods, he appears to have been in clinical remission and generally well. In such circumstances, it is difficult to conclude a "handicap" as defined in the Code was present at the relevant times during the employment. Assuming for the sake of discussion that such a finding could be made in this case, it remains to be determined whether he received unequal treatment as a result of having Crohn's disease. Mr. Surge in his complaint alleges unequal treatment at the time of his dismissal in November, 1989 and at the time of a raise.



#### 4. Facts Surrounding Mr. Surge's dismissal on November 8, 1989

Mr. Surge alleges that he was dismissed from his employment because of his handicap. He acknowledges that he was dismissed because of absenteeism but submits that this absenteeism was due to his Crohn's disease.

The employer at the hearing wanted to raise issues of Mr. Surge's competence both as a glazier and as a glazier's helper as an additional reason for dismissal and the possibility that the work in question was not compatible with the handicap alleged. The Board advised that it was addressing only the basis on which the complaint was made - absenteeism and whether it was related to a handicap protected under the Code.

##### a. Complaints of Absenteeism

From the testimony of Mr. Brown and Mr. Surge, it appeared that Mr. Surge's absences had less impact early on in his employment, given that the company was a bigger operation then with more people available to perform the necessary duties. Mr. Brown stated that it was only when the company was "down-sized" in early 1989, and he took over more direct control of the work being done, that Mr. Surge's absences became a problem for him. Mr. Surge's testimony confirmed that conflicts began around the time of the move to new premises which coincided with the "down-sizing".

Mr. Surge was asked at the hearing when he first informed his employer of his Crohn's disease. He said it was December 1986 [later confirmed to be December 1985] when he went to Emergency and was hospitalized for several days. Mr. Surge recalled that Mr. Brown was "understanding" when he was hospitalized and that concerns about his absenteeism did not occur until a year or two prior to dismissal.

Mr. Surge also did not dispute that he had significant absences from work between 1985 to 1989, with greater frequency in the latter part of his employment. He estimated that his absences averaged one day a week. He said that these absences were due to numerous medical visits required as a result of his bowel condition and to time off for flare-ups of his Crohn's disease which required him to stay home until the pain associated with a bowel blockage subsided. He also stated that the reasons for his absences would vary and be also for his "back, sore chest, flu, a cold, headaches, toothaches, fatigue". He was unsure which or how many of the absences from work, and which or how many of his medical visits, were due to the bowel problems. He recalled staying home "on occasion" for Crohn's disease. When asked to estimate how often he lost time specifically for Crohn's disease, he replied: "Well, it varied from month to month, year to year. Towards '89 it increased worse till '91, it even worsened up".

Mr. Brown, in his questioning of Mr. Surge, seemed less concerned with the frequent absences from work and more concerned that they were taken with little notice in advance and no explanation. Mr. Surge replied that he, or his wife, would call in between 8:15 and 8:45 a.m. on the days he would be absent but was vague about whether reasons were given by him or by his wife. He claimed no knowledge of his wife's conversations with the employer. The impression left by the testimony of Mr. Surge, Mr. Brown and Mr. Hoyle (a co-worker who sometimes received such calls) was that indeed very little was said beyond advising the employer that Mr. Surge would not be in.

Mr. Surge took the position at the hearing that the frequency of his absences from work should not matter to his employer, since he was not paid for days that he didn't work. Mr. Brown disagreed, stating that every absence had a consequence in terms of co-workers and jobs his company either had taken and assigned or could take and assign that day.

Mr. Brown and the co-workers who testified said that Mr. Surge had told them of his bowel condition, in a way that they all understood him to have problems "with his bowels". They were sympathetic and assumed that at least some of his



absences would be due to this problem, even though all witnesses confirmed that very little was specifically said by Mr. Surge to confirm this. However, they also expressed a concern that the absences were curiously predictable, as they seemed to occur frequently around weekends or unpleasant work assignments.

Mr. Hoyle, a co-worker normally assigned to leadwork on stained glass installations, testified that he would often have to be reassigned to do Mr. Surge's job, as a helper installing clear glass openings on construction sites. He said that he resented the fact that:

...it seemed that whenever there was a big job coming up and it was a dirty job, you know, one of those jobs nobody likes to do and it's in the middle of winter and you are out there doing steel frame hack-outs, the next day almost like Monday follows Sunday, Bob would not be there. And I would have to go out and do the work. And I am going to work dressed in a pair of sweat pants and a T-shirt expecting to work in the shop, and at 8:20 Bob's wife is phoning and saying, "He is not going to be in.", and I am out the door and having to do the job. And I resented that. And I also resented the fact that while I am doing this, my work suffered.

#### b. Documentation with respect to absences

Since Mr. Surge had no real recollection of periods of flare-ups of his Crohn's disease during his employment from 1985 to 1989, other than periods of hospitalization on two occasions, the Board had to rely on available documentation.

#### i. Attendance Records 1985-1989

Mr. Brown submitted a "summary of attendance" for the years 1985-1989 which Ms. Ffolkes-Abrahams compared to the timesheets submitted. There was no sick leave or other provisions for unscheduled absences. Essentially, if one did not come in to work, one was not paid for the time missed. Based on a 40 hour week

and the completion of timesheets, the parties agreed that from August to December, 1985, Mr. Surge was absent 11 days; in all of 1986, 19 days; in all of 1987, 19 days; in all of 1988, 21 days; and from January to November, 1989, 24 days. These were days he was scheduled to work and did not. They did not include vacation or statutory holidays.

## ii. Doctor's notes and Hospital Records 1985-1989

Eight handwritten notes from doctors explaining Mr. Surge's absences from work were given to his employer and submitted at the hearing. As well, hospital records for visits by Mr. Surge were submitted. These are dealt with below in chronological order.

An Emergency Record for December 16, 1985 reports the presenting complaint as "vomiting up blood". The discharge summary by Dr. K. Wong on December 19, 1985 stated:

This 34-year-old man was admitted through the ER with crampy abdominal pain and nausea and vomiting. In one vomitus the patient noted blood. In 1977 he was diagnosed to have Crohn's disease. He had a fisto-ileo resection along with a right hemicolectomy. The patient since then had been doing well. His appetite is good and usually he would have 3 to 4 loose BM's daily but he had not required any medication.

In the past year or so the patient noticed more often crampy lower abdominal pain. There is no evidence of obstruction though. He was admitted for investigation for possible recurrence of Crohn's disease and also for investigation of the vomiting. ...

### FINAL DIAGNOSIS:

Abdominal pain, ? recurrence of Crohn's. Upper GI bleed, likely small Mallory-Weiss tear

[emphasis added]

On February 24, 1987, a handwritten note from a Dr. Robison of the Broadview Community Health Clinic, stated simply: "This man was seen today for an office appointment". Mr. Surge recalled that this visit was for "problems with the nerves in my legs and my lower back; sciatica...".

On March 23, 1987, a note from Dr. W. Prusin, oral and maxillofacial surgeon, stated Mr. Surge was under his care on that date "all day" and would be able to return to regular duties on Tuesday, March 24, 1987. Mr. Surge recalled an absence for a tooth extraction, at the hearing.

On October 23, 1987, the complainant was again seen at the Emergency Department of Scarborough General Hospital, complaining of possible food poisoning, vomiting and diarrhea. The Emergency Room reports that he had "had [surgery] for Crohn's disease since then OK". X-rays taken of the abdomen were interpreted as "compatible with an early small bowel obstruction".

On December 10, 1987, a note from Dr. Lagusis advised "To whom it may concern" that her patient was "unable to climb ladders" because of his back.

On September 25, 1988, Mr. Surge was seen in the Emergency Department of Scarborough Grace General Hospital for abdominal pains. A report on that date by Dr. J. Hamilton, surgeon, stated:

This 37-year-old male came in to the Scarborough Grace Emergency Room complaining of rather severe crampy abdominal pain of some twelve hours duration.

He has a history of Crohn's disease and bowel resection ten years ago. Intermittently he has had episodes of crampy abdominal pain over the years, particularly if he eats heavy food. Examination had demonstrated fullness and moderate tenderness in the right lower quadrant.

Mr. Surge was observed for several hours in the Emergency Room. He began to pass gas and had two bowel movements with significant relief of his abdominal discomfort.

I believe that we are probably dealing with a partial small bowel obstruction secondary to adhesions and/or stricturing of Crohn's disease. ...

[emphasis added]

In 1989, two handwritten medical notes and an emergency record refer to Mr. Surge's fall from a ladder at work on February 13, 1989, with injuries to his left ribs. He was off work for a number of weeks. At the hearing, Dr. Lagusis described this injury as minor, involving no fractures.

On August 29, September 27, and October 31, 1989, handwritten notes from doctors state merely that Mr. Surge was at a medical facility on those dates, with no details given. At the hearing, Mr. Surge recalled that the August 29th visit was related to his bowel problems and that on September 27th, he was experiencing:

back problems and I was having a little problem with my bowels. I was getting a bloating like a ballooning effect in my right sides, cramps and bleeding. ...

Q. And would that be related to your Crohn's disease?

A. Yes, I believe that might have been the day I got the result from the x-rays.

It appears from this that Mr. Surge associated the x-ray findings of reactivated Crohn's disease as *following* bowel-related symptoms. This recollection of experiencing symptoms in September, 1989 does not appear to be borne out by the medical records at the clinic, as described by Dr. Lagusis, in which no mention of bowel-related symptoms is made until later in the fall of 1989.

In his complaint to the Commission, Mr. Surge referred to a note from his doctor dated September 29, 1989 addressing his "worsening" bowel condition. This note was not produced at the hearing. The note on September 27, 1989 from Dr.



Bercuson stated only: "This man was seen here this morning." An x-ray report dated September 29, 1989, taken of the small bowel and upper gastrointestinal tract, reported only that the findings were "compatible with a recurrence of his inflammatory bowel disease...".

On October 31, 1989, another doctor's note was given to Mr. Brown. This was eight days before Mr. Surge's dismissal from employment. The note stated that he "may return to work" and "is to be followed by family physician" and "was seen earlier today in our ER Department." Mr. Surge recalled that this visit was because of "very bad back problems".

c. Details of the dismissal on November 8, 1989

On July 10, 1989, Mr. Surge said that he was forced to sign the following letter from Mr. Brown:

Mr. Robert Surge: WARNING OF PENDING DISMISSAL RE: ABSENTEEISM:

Bob as you aware this company is too small to have one of it's [sic] employees absent as much as you are. I asked you on Friday afternoon, July 7, to make an effort to be in early on Monday July 10, 1989, regarding the Oakville job. Your wife telephoned instead and stated that you would not be at work. NO REASON. NO EXCUSE, just that you would not be into work. You are making it impossible to maintain schedules. Your rate of persistent absence from work, usually without good reason is the worst in the company. If we can't depend on you we will be forced out of necessity to replace you. Be advised that this will be your final warning on this matter.

... I HAVE READ AND UNDERSTOOD THE ABOVE: "Fired Nov 8 1989 - 435 pm"

Mr. Surge testified that he gave Mr. Brown notice of his November 9, 1989 medical appointment in late September, 1989 and merely reminded him of it on



his timesheet for the period ending November 8, 1989. Mr. Surge said that, because he had told Mr. Brown of the appointment earlier and because no concern was expressed at that time by Mr. Brown, he was "surprised" on November 8, 1989, after telling Chris Brown that he would be off the next day for a doctor's appointment, by the request to speak with Mr. Brown.

## 5. Conclusions regarding dismissal on November 8, 1989

### a. Findings regarding Mr. Surge's absences from 1985-1989

The medical documentation is consistent with Mr. Surge's Crohn's disease being infrequently symptomatic in the period from 1985-1989. The X-rays disclosing a blockage in late September 1989 led to what appears to have been the first referral to a specialist for Crohn's disease in this period. On the evidence, it appears that these x-rays resulted not from bowel-related complaints but a blood test ordered for other complaints.

Mr. Surge testified that his time off for medical visits were for flus, colds, tooth extraction, etc., as well as for Crohn's disease. Asked to estimate how much of the time off related to Crohn's disease, he said "just over half", including time off for doctor's appointments. Mr. Surge's recollection was of a number of other problems troubling him in this period, such as back complaints, which is borne out by the frequency of his medical visits, according to Dr. Lagusis, with infrequent reference to bowel complaints.

Mr. Brown asked Mr. Surge at the hearing how long his medical appointments generally lasted, referring to work timesheets which indicated no half-day absences. He replied it would be "possibly a couple of hours" for a check-up. Mr. Brown then asked why Mr. Surge did not return to work after that and he replied "I wouldn't want to comment on that. I don't want to incriminate myself." Earlier, in response to Mr. Brown's statement: "You never ever came back to work after those doctors' appointments", Mr. Surge replied: "No, that's

correct." This statement, while conflicting, was initially interpreted on the basis of demeanour to be a confirmation but when asked to clarify it later, Mr. Surge then said that he believed he returned after "some", but "not all" and that it would often be inconvenient for him to come back to work for a short time, because of the travel involved.

One witness made reference to Mr. Surge making jokes about hunting and fishing season and other private pursuits as reasons for his absences; it is not necessary for me to determine the veracity of this. It is only the impact of Crohn's disease on his absences that is relevant to determine discrimination in employment because of this condition.

I cannot conclude from the testimony, or the documentation, that Mr. Surge's Crohn's disease was a significant factor in his frequent absences from work between 1985 and 1989. None of the medical notes supplied regarding absences makes any reference to this condition as a reason for the absence. The hospital records address abdominal complaints for specific periods of time in December, 1985, October, 1987 and September, 1988 and do not begin to account for the 3-4 weeks, on average, that Mr. Surge was absent each year.

#### b. Events on day of dismissal

Mr. Surge testified that his employment was terminated by Harold Brown for "continuous absenteeism" and that he was given "the ultimatum that if I was to leave the next day for the appointment that they would no longer need me and he was sorry that he would have to let me go" as the company "could no longer afford me". He said that he said nothing and left Mr. Brown's office. [The term "ultimatum" is in contrast to the tone described by Mr. Surge in his complaint.]

Mr. Brown testified that when he called Mr. Surge in to see him on November 8th, he wanted to know why he had not been told earlier "than the night before the medical appointment" of his intended absence. He said that he then told Mr.

Surge he would have to terminate his employment because he could not plan jobs or think of what he would be doing "tomorrow or next week" because he was away "all the time". He essentially thought that Mr. Surge "could do better" but was not trying and that his work performance was also "suffering". He said that:

Then Mr. Surge, without waiting to hear another word, turned out of the office and at the door to my office he turned around and said, "I'm going to get even. I'm going to Worker's Compensation and claim I have a bad back." I said, "You never reported this to me before." And he said, "You'll be sorry.", and disappeared.

A review of Mr. Surge's complaint, as filed, suggests the first time he advised Mr. Brown of his doctor's appointment was on November 8, 1989. This is also consistent with Mr. Brown's testimony at the hearing and I do not accept the statement at the hearing that earlier notice was given and that the timesheet notation on November 8, 1989 was merely a reminder.

Credibility is very much an issue in this complaint. On the facts regarding the dismissal, the testimony of Mr. Brown and Mr. Surge are at odds chiefly with respect to the ending of their conversation on November 8, 1989, i.e. Mr. Surge's alleged threat to "get even" with a claim of a bad back. In assessing both witnesses' testimony overall, I accept Mr. Brown's version of the end of the conversation on November 8, 1989. Mr. Brown, in acting as his own representative, made many contentious and irrelevant statements, which made his testimony on some matters questionable. However, I do accept his testimony regarding the events on November 8, 1989 as being given in a credible fashion and reliable.

From his own testimony, Mr. Surge was focussed on back complaints in the fall of 1989. As recently as October 31, 1989, he was seen at a local emergency room of a hospital with what he termed "very bad back problems". Regarding the ultimatum allegedly made by Mr. Brown on November 8, 1989, had other evidence established a relationship between Mr. Surge's previous absences and

his medical condition, it would be a critical factor. As it is, there is some question that such an ultimatum was given and if it were, on the facts of this case I would view it more as an inappropriate outburst of frustration regarding late notice for repeated absences than a cause of the dismissal itself.

I find on the evidence that the dismissal was based on chronic absenteeism. On the information provided, I cannot conclude that this was related to Crohn's disease, which was only occasionally symptomatic and resulted in hospital visits. Bowel discomfort and pain may well have been present at other times and may have occasionally caused Mr. Surge to decide not to come to work. [He recalled only one instance when it caused him to leave work.] However, I cannot conclude, on the facts presented, that Mr. Surge's bowel condition was the primary or even a significant cause of his chronic or continued absenteeism, outside the periods addressed in the hospital records.

I note particularly that Mr. Surge's frequent medical visits from 1985-1989 appear largely unrelated to his symptomatology from Crohn's disease. Mr. Surge was not averse to seeking medical attention and his complaints of bowel symptoms to Dr. Baker on November 9, 1989 are noted as having begun two weeks prior to this visit. This is consistent with the absence of bowel complaints when seen by Dr. Lagusis earlier in the fall of 1989.

In summary, I cannot conclude that Mr. Surge was denied equal treatment or dismissed from employment because he had Crohn's disease.

## 7. Facts and Conclusions regarding the raise

The allegations of a smaller raise than that given others, made by Mr. Surge in his complaint, were not disputed by Mr. Brown. He expressed consternation that Mr. Surge should know what others received as raises, suggesting he preferred a secretive management approach, and submitted a handwritten note, which Mr. Surge identified as his, which Mr. Brown said was given to him by



which Mr. Surge identified as his, which Mr. Brown said was given to him by Mr. Surge's foreman, Mr. Bibby. Mr. Brown said that Mr. Bibby told him that he found it on Mr. Surge's work table "where others could see it". Mr. Surge said it was a "doodle" destined for the garbage can. The pencilled note said:

Some people are so cheap! Make them think one thing and give them another thing!  
25[cents] raise, is a very very cheap! thing, you can piss more the [sic] that at one time  
in someone [sic] face! and feel better about it! Eat shit, it [sic] good for asshole. a  
million flies can't be wrong.

This note, obviously written in a fit of frustration, may or may not have been left for others to see, as contended by Mr. Brown. The import of the note for these proceedings is only as an insight as to Mr. Surge's concerns at the time of the raise. Neither Mr. Surge nor Mr. Brown had a firm recollection of when this particular disputed raise arose. The complaint stated it occurred in October, 1987.

Both Mr. Surge and Mr. Brown agreed that the refusal of a larger raise was based on the repeated absences of Mr. Surge, and that the company could not "afford" to pay him more given his absences. Since these absences were not determined to be related to his Crohn's disease, in any significant way, Mr. Surge's contention that he was denied a raise because of handicap is not supported by the evidence.

#### 8. Summary of Conclusions regarding discrimination

For the above reasons, assuming for discussion purposes that Mr. Surge's condition was a "handicap" as defined by the Code, the facts do not support his claim that he was dismissed or denied a raise because of that handicap. His absences from work were not found to be related in any significant way to his Crohn's disease.



## B. ALLEGED HARASSMENT BECAUSE OF HANDICAP

### 1. Complaint of Harassment

In his complaint, Mr. Surge refers to a memo regarding washroom use and to the following incidents of harassment:

5. Later in 1987, Mr. Chris Brown, Manager and son of my employer began complaining about frequent trips to the washroom. Also fellow employees began making comments such as, "Going to the washroom again," or "Something stinks." ....

8. In October, 1989, my foreman, Mr. Bill Bibby, said, "My stomach hurts and I have the shits. I must have got it from you."

### 2. Evidence heard regarding harassment

The evidence presented at the hearing regarding harassment was that of Mr. Surge, Mr. May, Mr. Hoyle and Mr. Brown. The Board heard no evidence from either Chris Brown, who attended the hearing, or from Mr. Bibby, who did not. No testimony was heard even from Mr. Surge regarding the allegations directed against Mr. Bibby in the complaint and I will therefore make no finding regarding it, assuming it to have been withdrawn.

The essence of the harassment alleged was based on comments about the frequency of washroom use and the posting of a particular memo.

a. washroom use

At the hearing, Mr. Surge said that he used the washroom more frequently than others. The following are questions put to him by Commission counsel and his replies:

Q. Can you tell us why [you had to take frequent trips to the washroom]?

A. For several reasons. Some were to relieve my bowels. Others were to clean my hands as I always had dirty work to do and my hands were always quite dirty. And to go out to do a service call, you would want to be clean and presentable, so I would have to wash my hands.

Q. Would you take several trips to a washroom?

A. In a day?

Q. Yes.

A. Yes, I would. Just for cleaning my hands alone plus for my bowel condition yes, I used the washroom a lot more than the average person does.

Q. How many times would you have to go to the washroom for bowel movements?

A. Three to four times in the morning. That was just for my bodily functions. Then there would be at least three other times just for the cleansing of my hands.

THE CHAIRPERSON: So you are saying six to seven times in a morning?

THE WITNESS: Not generally, no. In the whole period of a day I would use the washroom roughly seven times. If you take into account you wash your hands before coffee break, before lunch, and before going out on service calls.

There were no complaints about access to washroom facilities by Mr. Surge. When at the employer's workplace, he used a washroom set aside for use by all employees, other than office or management employees who had their own separate washroom. Mr. Surge made no complaints about the washroom being in use or otherwise unavailable when he required it at the workplace. The washroom was located in a room used by the person assigned to work on the leading of stained glass windows. It was on the inside wall of that room and had no window but a venting fan was constantly on.

Mr. Surge said that he was never stopped or prevented from using the washroom. He said that there would be "verbal complaints about the washroom smelling, [and] the toilet seat having splatters under it" which made him feel "ridiculed". He said that it was humiliating for him to have to pass by his co-workers to go to the washroom and "to relieve the stress", he would periodically make a joke himself about his washroom trips.

Mr. May worked with the company for 10 months between 1987 and 1988. His work area was in the room where the washroom was located. He recalled Mr. Surge making jokes about it such as "I wouldn't go in there for awhile", etc. He recalled others laughing and telling others looking for Mr. Surge that you could find him in the washroom. The reasons for Mr. Surge's frequent use and long stays in the washroom were speculated upon. Some but not all were thought to be related to Mr. Surge's bowel condition. He said he took his cue about how to react to these comments about his frequent use of the washroom from Mr. Surge himself. He said that since Mr. Surge would make jokes about it, he understood humour to be Mr. Surge's preferred way of coping with the situation. He said that comments about odour were made after Mr. Surge, or anyone, used the washroom. He agreed with Mr. Brown's statement that the workplace was "jovial as a rule".

Mr. Hoyle said that most of the comments directed toward or regarding Mr. Surge were not about his bowel problem but about the personal "stories" he told

them about his life outside of work. He confirmed that comments were made in the workplace about Mr. Surge's frequent use of the washroom but said that the comments were prompted by "the fact that he was taking two hours out of the day" and somebody else had to do the work while he was in the washroom. In other words, complaints were about the result of frequent washroom use, not the need for frequent washroom use. Comments would also be made about Mr. Surge "making a stink" but these were made to anyone using the washroom.

#### b. the memo

In or about the spring of 1988, a memo was put on the bulletin board and also on Mr. Surge's clipboard. The latter, according to Mr. Surge, was initialled "H.B.". Mr. Brown said that his wife had given him the memo after it made the rounds at her place of employment and he placed it on the company's bulletin board as a "joke". The memo is addressed "To: All Employees", from "Employee Benefits Department", with the subject listed as "Restroom Trip Policy". It states:

In the past, employees were permitted to make trips to the restroom under informal guidelines. Effective May 1, 1987, a Restroom Trip Policy (RTP) will be established to provide a consistent method of accounting for each employee's restroom time and ensuring equal treatment of all employees.

Under this policy, a Restroom Trip Bank (RTB) will be established for each employee. The first day of each month, employees will be given a Restroom Trip Credit (RTC) of 20. Restroom Trip Credits can be accumulated from month to month.

Currently the entrances to all restrooms are being equipped with personnel identification stations and computer-linked voice print recognition. During the next two weeks, each employee must provide two copies of voice prints (one normal, one under stress) to the personnel department. The voice print recognition stations will be operational, but not restrictive, for the month of April; employees should acquaint themselves with the stations during that period.



If an employee's Restroom Trip Bank balance reaches zero, the doors to all restroom will not unlock for that employee's voice until the first of the next month.

In addition, all restroom stalls are being equipped with timed paper roll retractors. If the stall is occupied for more than three minutes, an alarm will sound. Thirty seconds after the alarm sounds, the roll of paper in the stall will retract, the toilet will flush and the stall door will open.

If you have any questions regarding the new policy, please ask your supervisor.

Quite understandably, Mr. Surge did not find this memo amusing and he felt it was directed at him for two reasons: a) he used the washroom more than anyone else; and b) a copy of the memo was placed on his clipboard. He did not know who put it on his clipboard or who initialled it "H.B." but believed that it was Chris Brown. He recalled that Harold Brown was on vacation at the time.

## 2. Did the memo or comments about washroom use constitute harassment?

The term "harassment" is defined in section 10 of the Code as follows:

"harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

By section 5(2), every employee has a right to freedom from harassment in the workplace by the employer or another employee because of handicap. Again, for the purposes of discussion, I will assume that Mr. Surge had a handicap, as defined in the Code.

In reviewing the comments from other employees, I cannot construe them as a course of vexatious comment that ought reasonably to be known to be unwelcome. The comments about odour appear to have been generally directed at users of the washroom. The workplace appears to have been one where bodily functions were generally the subject of comment or practical jokes. One

particular prank involved Mr. Surge acting, he said, at the instigation of Chris Brown. He apparently used a candy bar (Rollo) to stain the toilet seat in the washroom at the workplace to show his foreman, Mr. Bibby, what a dirty toilet seat looked like. Such comments or pranks can pass for humour in some situations, either good-natured or otherwise.

In this workplace, comments about bathroom odour were not limited to Mr. Surge, but it is possible that he would feel more vulnerable to the cutting edge of such comments because of his personal medical condition. He testified, and this was verified by other witnesses, that he dealt with this by using humour himself to deflect the force of the comments from others. This is not an unusual use of humour as a coping mechanism.

Humour, when directed at others, can be a cloak for animosity and antagonism which, in certain situations, arguably can constitute harassment. Much will depend on the context. It is also not a necessary inference that if the humour is self-directed as well that there is no harassment - i.e. that one could not have known the comments to be unwelcome.

In this case, it is the frequency more than the nature of Mr. Surge's washroom visits that was the subject of comment. I accept that his condition would require sudden and perhaps extended visits to the washroom. However, the overall frequency in this case was not uppermost, even in Mr. Surge's recollection, as being due to his Crohn's disease. Almost equally a cause of the frequency was the need to wash his hands after doing 'dirty' work. He expressed concern at the hearing about being assigned 'dirty' work because of his handicap, saying that others were motivated to give health-threatening work to those who were already sick. This concern appears without foundation on the evidence presented.

On balance, as with his absences from work, his absences for washroom use appear related largely to factors other than Crohn's disease, and on all the evidence heard, I cannot conclude that the comments about washroom use made

in this workplace regarding Mr. Surge constitute "harassment" as defined in the Code.

In reviewing the memo, a single incident, I note that the humour in the memo depends on there being a perception of inappropriate or excessive washroom use in the workplace. I can understand that Mr. Surge would feel it was directed at him; given that he used the washroom more than the others. I accept Mr. Surge's uncontradicted evidence that Chris Brown placed it on his clipboard and initialled it "H.B.". Harold Brown claimed responsibility only for placing it on the bulletin board.

While this memo was an inappropriate attempt at workplace humour given the knowledge of Mr. Surge's condition, I am not satisfied, on the balance of probabilities, that he posted it with Mr. Surge in mind. Mr. Brown, while perhaps indirectly aware of Mr. Surge's frequent use of the washroom, in May, 1988, did not take an active supervisory role until later. Chris Brown, working more closely with Mr. Surge, and making the reference specific by placing it on Mr. Surge's clipboard did act vexatiously. Had evidence of other similar incidents been established, this action might have been found to be significant in a course of harassment conduct. However, on all the facts in this case, I am not satisfied that the placing of the memo on the clipboard constituted "harassment" as defined in the Code on its own or in combination with the more general comments about washroom use.

In summary, it appears to me that Mr. Surge was given considerable latitude in attendance and performance of duties until the "down-sizing" in late 1988. At this time, conflicts about Mr. Surge's chronic absenteeism became pronounced and culminated in his dismissal in November, 1989. For the reasons stated, I cannot conclude that his Crohn's disease was a significant factor in that absenteeism. Complaints about his washroom use were essentially about another form of absence and do not appear to have been directed at Mr. Surge's medical condition.

## ORDER

The complaint of Mr. Surge, filed on August 8, 1990, as against Mr. Harold E. Brown, Mr. Chris Brown, and Excelsior Glass Limited, is dismissed for the reasons set out above.

DATED AT TORONTO this 12th day of November, 1993.

A handwritten signature in cursive script, appearing to read 'R. Hartman', written over a horizontal line.

R. Hartman, Board of Inquiry